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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN MAGANA,

Defendant and Appellant.

B163942

(Los Angeles County
Super. Ct. No. NA050486)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Arthur Jean, Jr., Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.
Matthews and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Adrian Magana of the attempted murder of Ray Rien and found he personally and intentionally discharged a firearm, causing great bodily injury and committed the crime for the benefit of a criminal street gang. (Pen. Code, §§ 187, 664; 12022.53, subds. (b)-(d); 186.22, subd. (a)(1).) He was also found guilty of residential burglary against Tee Truong and assault with a firearm each against Bernadette Bryant and Terrence Seals. (Pen. Code, §§ 459; 245, subd. (a)(2).) In association with the assault charges, the jury found he personally used a handgun and committed the crimes for the benefit of a criminal street gang. (Pen. Code, §§ 12022.5, subd. (a)(1); 186.22, subd. (b)(1).) The trial court sentenced him to state prison for the aggregate term of 44 years to life.

Appealing from the judgment, he complains of sentencing error. We affirm.

DISCUSSION

Appellant's sentence of 44 years to life consists of the following: the high term of nine years for attempted murder, plus 25 years to life for the firearm use enhancement, and 10 years for the criminal street gang enhancement under Penal Code section 186.22, subdivision (b)(1).

Appellant's sole contention on appeal is the court erred in imposing a 10-year term upon his life sentence for count 1, pursuant to Penal Code section 186.22, subdivision (b)(1), rather than a minimum parole period of 15 years, pursuant to Penal Code section 186.22, subdivision (b)(5).¹ His claim is without merit in light of *People v. Montes*

¹ Penal Code section 186.22 provides, in relevant part: "(b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . as follows: [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. [¶] (5) Except as

(2003) 31 Cal.4th 350 (*Montes*).²

In *Montes*, the defendant was convicted of attempted murder. He was sentenced to the middle term of seven years, plus 25 years to life for the firearm enhancement and 10 years for the criminal street gang enhancement of Penal Code section 186.22, subdivision (b)(1). As in the instant case, the defendant argued the trial court should have instead imposed the 15-year minimum parole period mandated by Penal Code section 186.22, subdivision (b)(5), construing that statute to apply when a defendant is convicted of a felony “punishable in the state prison for life.” However, the California Supreme Court disagreed and held Penal Code “section 186.22, subdivision (b)(5) applies only where the underlying felony itself provides for a life sentence.” (*Montes, supra*, 31 Cal.4th at p. 353.)

Because appellant, like the *Montes* defendant was sentenced on the underlying felony to a determinate term, Penal Code section 186.22, subdivision (b)(5) is inapplicable. Appellant was properly sentenced.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.

provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served.”

² Appellant’s opening brief was filed before *Montes* was decided. The People relied on *Montes* in the respondent’s brief. No reply brief was filed by appellant.